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Supreme Court, U.S.
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No. 00-491

In the

Supreme Court of the United States

STEVENS CREEK QUARRY, INCORPORATED,

Petitioner,

versus

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CALIFORNIA MINING ASSOCIATION; CONSTRUCTION MATERIALS ASSOCIATION OF CALIFORNIA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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2400

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The California Mining Association (hereinafter referred to as "Mining") and the Construction Materials Association of California (hereinafter referred to as "Construction") hereby respectfully move pursuant to Rule 37 of the Rules of this Court to file the attached Brief *Amici Curiae* in support of the petition of Stevens Creek Quarry, Incorporated (hereinafter referred to "Stevens Creek") for writ of certiorari from this Court. The consent of the attorney for the petitioner Stevens Creek has been obtained. The consent of the attorney for the respondent Santa Clara County Planning Commission (hereinafter referred to as "the County") was requested but refused.

The written response of Stevens Creek to the request of Mining and Construction for the filing of the attached Brief *Amici Curiae* has been duly filed with the Clerk of this Court. The written response of the County to the request of Mining and Construction for the filing of the attached Brief *Amici Curiae* will be duly filed with the Clerk of this Court as soon as it is received.

Mining is an association of California mine operators begun in 1961 as a loosely formed group which formalized their relationship in 1977 as the California Mining Association. Its membership now includes both large and small mining operations that are responsible for most of the industrial minerals and precious metals which are produced in California. These mines operate in an array of climate zones and diverse physiographic locales throughout California. Mining also includes members in mining-related work such as consultants, attorneys, suppliers and government agencies.

Construction is a trade association composed of approximately seventy (70) aggregate and ready mix producers in Northern and Central California. Its members provide aggregate and concrete products to build roads,

bridges, buildings, homes and water systems. In addition, aggregate products are used for erosion control, landscaping and water filtration systems. Its members maintain over 250 aggregate and ready mix sites in Northern and Central California and engage in a continuing collaboration with state and local government to foster safe aggregate mining policies and reclamation efforts which return aggregate sites to productive farmlands and nature areas. The demand for aggregates caused by a growing economy and infrastructure development has outstripped aggregate supply in California because of the limited sites made available to Construction's members, part of an aggregate industry which generated $1.2 billion statewide in 1999.

The members of both Mining and Construction have a viable interest in the granting of Stevens Creek's petition for certiorari. As the demand for aggregate products grows in response to continuing population growth and the construction of new infrastructure as well as its repair and replacement, the need for identifying aggregate mining sites increases. California ranks third in the nation in the number of operating mines with 553; Texas is second with 579 mines and New York is first with 604. Although nature dictates the location of natural aggregates, the pits and quarries which serve as prime aggregate sources for economic reasons are almost always within reasonable distances of the market area where the product will be used, i.e., in and around population centers.

Prime aggregate areas are lost if housing or industrial development is built over them. Moreover, aggregate operations initially established in once rural areas are commonly extinguished or curtailed as the population centers encroach on these operations. The tension between citizens in these new residential areas and the nearby mining operations becomes inevitable and expresses itself in efforts by the citizens' regulatory bodies to require that the mining of aggregates be done far from its residential boundaries at whatever cost to the aggregate industry.

The primary issue raised by this petition is whether a mine operator possesses the substantive due process right under the federal constitution to be free from abusive government treatment where it is alleged that a regulatory authority has imposed upon it new conditions for its mining operation without legal authority and solely as a means to coerce the surrender of its legally vested property rights not subject to regulation. The question has implications extending beyond the particular situation now before the Court. Members of Mining and Construction maintain aggregate mining sites throughout California and each one has continuing contact with state and local regulatory bodies in an effort to accommodate their mining operations with nearby residential development. They should know whether the substantive due process clause protecting each citizen from abusive government behavior has viability in this land use context; and whether regulatory bodies seeking to curtail their mining operations are subject to damages and injunctive relief for the violation of their federal civil rights if they carry out that mission in an unfair, oppressive or coercive manner.

The petitioner Stevens Creek necessarily has concentrated on the particular facts of its own case. In their accompanying Brief *Amici Curiae*, Mining and Construction will address the distinct split in the federal circuit courts of appeals on the issue of whether the substantive due process clause is subsumed by the takings clause in the context of a regulatory dispute over land use. They will also address the need for this Court to fill the doctrinal void which has left the contours of substantive due process undefined in this area, threatening the survival of the mining industry itself. Finally, they will identify the policy reasons this Court should take into account in determining whether to grant the petition. Mining and Construction therefore believe that their contribution should assist the Court in giving consideration to the broader aspects of the problem which this petition presents.

October 31, 2000

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QUESTIONS PRESENTED.

1. Is the conflict among the circuit courts of appeals over whether abusive government conduct in regulating land use constitutes a denial of substantive due process or a taking serious enough warrant resolution by this Court?

2. Should this Court as a matter of sound social policy restate the contours of the protection afforded property owners by substantive due process in the land use context in order to cure the present doctrinal void which threatens to extinguish valuable vested property rights of the mining industry and along with those rights the mining industry itself?

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTEREST OF AMICI CURIAE 2

STATEMENT 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

ALBRIGHT V. OLIVER, 510 U.S. 266, 288 (1994)..... 6, 9, 11

ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEV. CORP., 429 U.S. 252, 267 (1977)..... 8

ARMENDARIZ V. PENMAN, 75 F.3D 1311, 1326 (9TH CIR. 1996)(EN BANC)..... 9

BATEMAN V. CITY OF WEST BOUNTIFUL, 89 F.3D 704, 709 (10TH CIR. 1996)..... 10

BERGER V. CITY OF MAYFIELD HEIGHTS, 154 F.3D 621 (6TH CIR. 1998)..... 9

BICKERSTAFF CLAY PRODUCTS V. HARRIS COUNTY, GEORGIA, 89 F.3D 1481, 1489-1490 (11TH CIR. 1996).... 10

BRADY V. COLCHESTER, 863 F.2D 205, 215-216 (2ND CIR. 1988)..... 8

COLLINS V. HARKER HEIGHTS, 503 U.S. 115, 125 (1992). 5, 6

CONLEY V. GIBSON, 355 U.S. 41, 45-46 (1957)..... 11

CONSTITUTION. BUCKLES V. KING COUNTY, 191 F.3D 1127, 1137 (9TH CIR. 1999)..... 9

COUNTY OF SACRAMENTO V. LEWIS, 523 U.S. 833, 843-849 (1998)..... 7, 11

DANIELS V. WILLIAMS, 474 U.S. 327, 331 (1986)..... 5, 6, 7

DENT V. WEST VIRGINIA, 129 U.S. 114, 123 (1889)..... 6

GARRITY V. NEW JERSEY, 385 U.S. 493, 498 (1967)..... 12

GERSTEIN V. PUGH, 420 U.S. 103 (1975)..... 6

GOSNELL V. CITY OF TROY, 59 F.3D 654, 657-658 (7TH CIR. 1995) 9

GRAHAM V. CONNOR, 490 U.S. 386(1989) 6, 11

GRAHAM V. CONNOR, 490 U.S. 386, 395 (1989) 6

GRAHAM. SEE TEXAS MANUFACTURED HOUSING ASS'N, INC. V. CITY OF NEDERLAND, 101 F.3D 1095, 1106 (5TH CIR. 1996) 9

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL, 505 U.S. 1003, 1017-1019 (1992)..... 7

MACRI V. KING COUNTY, 126 F.3D 1125, 1128-1130 (9TH CIR. 1997) 9

MOORE V. EAST CLEVELAND, 431 U. S. 494, 501 (1977).. 5, 6

MURRAY'S LESSEE V. HOBOKEN LAND & IMPROVEMENT CO., 18 HOW. 272, 277 (1856)..... 6

POE V. ULLMAN, 367 U.S. 497, 542-543(1961)..... 5

SAMERIC CORP., INC. V. CITY OF PHILADELPHIA, 143 F.3D 582, 590-595 (3RD CIR. 1998)..... 9

SILVERMAN V. BARRY, 845 F.2D 1072, 1080 (D.C.CIR. 1988) 9

SOLDAL V. COOK COUNTY, 506 U.S. 56, 70 (1992)..... 12

SOUTH COUNTY SAND & GRAVEL V. TOWN OF SOUTH KINGSTON, 160 F.3D 834, 835 (1ST CIR. 1998)..... 8

TAKINGS CLAUSE. SEE VILLAGE OF WILLOWBROOK V. OLECH, ___ U.S.___, 120 S. CT. 1073, 1075 (2000)..... 12

TAYLOR INV., LTD. V. UPPER DARBY TP., 983 F.2D 1285, 1292-1294 (1993), CERT. DENIED, 510 U.S. 914 (1993).... 8

TRI COUNTY INDUSTRIES V. DISTRICT OF COLUMBIA, 104 F.3D 455, 459 (D.C. CIR. 1997) 9

UNITED STATES V. JAMES DANIEL GOOD REAL PROPERTY, 510 U.S. 43, 49-50 (1993) 12

UNITED STATES V. LANIER, 520 U.S. 259, 272 N.7 (1997).... 6

VILLAGE POND, INC. V. TOWN OF DARIEN, 56 F.3D 375, 378-379 (2ND CIR. 1995)..... 8

WHITLEY V. ALBERS, 475 U.S. 312(1986)..... 6

WILLIAMSON PLANNING COMM'N V. HAMILTON BANK, 473 U.S. 172, 186-200 (1985) 7

FEDERAL STATUTES

CIVIL RIGHTS ACT-42 U.S.C. SECTION 1983 ..... 1, 2, 4

OTHER AUTHORITIES

UNITED STATES CONSTITUTION, AMENDMENT IV, SECTION 1: 1

UNITED STATES CONSTITUTION, AMENDMENT V:..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

...nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment IV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

Civil Rights Act–42 U.S.C. Section 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF INTEREST OF THE AMICI[1]

The interest of the California Mining Association (hereinafter referred to as "Mining") and the Construction Materials Association of California (hereinafter referred to as "Construction") is set forth in their attached motion for leave to file this Brief *Amici Curiae* in support of the granting of Stevens Creek, Incorporated's (hereinafter referred to as "Stevens Creek") petition for certiorari.

STATEMENT OF FACTS RELEVANT TO THE AMICI CURIAE

Stevens Creek operates its aggregate mining and recycling operation from two different adjacent parcels along Stevens Canyon Road in Santa Clara County (Pet. App. 5-6). Mining takes place on the so-called "Front Parcel" pursuant to a use permit first issued by the respondent Santa Clara County Planning Commission (hereinafter referred to as "the County") in 1950 and then renewed in 1984, 1990 and 1995 (*Id.*). The 1995 version of the use permit, issued by the County on February 18, 1995, expires on February 18, 2015. The use permit for the Front Parcel now contains at least forty-six (46) conditions, most of which address the concerns of the surrounding neighborhoods.

As for the so-called "Back Parcel," Stevens Creek carries on mining operations there **as of right** pursuant to a legally vested, nonconforming "grandfathered" entitlement to do so. Be-cause mining on this Back Parcel is allowed as a protected nonconforming "grandfathered" right, the County is without any power to regulate this part of Stevens Creek's mining operation.

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[1] Pursuant to Rule 37.6 of this Court, the amici curiae disclose that this brief was prepared entirely by their counsel and that he was compensated for his work by the petitioner Stevens Creek.

The core of Stevens Creek's substantive due process claim in its Second Amended Complaint is its allegation that the County, responding to some neighbors' requests to curtail mining operations on the Back Parcel, coerced Stevens Creek with the threat of imposing more onerous conditions for the Front Parcel (over which it had zoning control) so that it would surrender or renounce its vested "grandfathered" rights to mine the Back Parcel free of the County's regulatory control. It is this alleged abusive exercise of its regulatory power over one parcel by the County to coerce the surrender of a landowner's vested rights in another parcel over which it has no rightful regulatory control which lies at the heart of Stevens Creek's substantive due process claim under the Fourteenth Amendment to the federal constitution.

Importantly, Stevens Creek's only other claim for relief in its complaint alleged a denial of procedural due process for the way the County noticed and then prosecuted the use permit violations supposedly occurring on both parcels. Finally, Stevens Creek did not allege and did not seek relief for the taking of any of its property under the Fifth Amendment to the federal constitution.

SUMMARY OF ARGUMENT

1. The right of a citizen to be free from governmental coercion is one of the bundle of liberties receiving protection under the concept of substantive due process encompassed by the Fourteenth Amendment to the federal constitution. This right does not stem from the ownership of property but rather from the core liberty concept that a government should act fairly towards its citizens in all matters by not imposing its weighty power to force or coerce citizens to give up vested rights. When that coercive, oppressive conduct by the government is alleged to affect property rights, the circuit courts of appeals are in conflict whether it constitutes a violation of substantive due process warranting injunctive

relief and damages under 42 U.S.C. Section 1983, or whether it is only a taking entitling the landowner to compensation. This important conflict among the federal appellate courts should be resolved by this Court with a definitive statement in this case concerning the reach of substantive due process when raised in the context of land use regulation.

2. This Court as a matter of sound social policy should restate and redefine the contours of the protection afforded property owners by substantive due process in the land use context in order to cure the present doctrinal void which threatens to extinguish valuable vested property rights of the mining industry and along with those rights the mining industry itself. Aggregate mining must continue in order to support the demonstrated needs of increased population as well as infrastructure development and repair. Mine closures, curtailment of mining operations and ultimately the extinguishment of the mining industry itself will ensue unless this Court reestablishes the right of the mining operator to seek relief in federal court for the deprivation of substantive due process whenever a government regulatory body seeks through intimidation, fear, coercion or threats to regulate the operator's exercise of vested property rights over which the government has no power to regulate in the first place.

ARGUMENT

I. The Conflict Among the Circuit Court of Appeals Over Whether Abusive Government Conduct in Regulating Land Use Constitutes a Substantive Due Process Violation or a Taking Should Prompt this Court To Grant the Petition For Certiorari.

The concept of substantive due process has not been reduced to any specific formula and "its content cannot be determined by reference to any code." *Poe v. Ullman*, 367 U.S. 497, 542-543(1961)(Harlan, J., dissenting). As the second Justice Harlan observed,

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. **It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints [by the state]....**

Id. (Emphasis supplied). See *Moore v. East Cleveland*, 431 U. S. 494, 501 (1977). The touchstone of substantive due process, then, is an individual's right to be free from the arbitrary action of government, regardless of the fairness of the procedures employed to implement that action. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). *Daniels v. Williams*, 474 U.S. 327, 331 (1986) citing *Dent v. West*

Virginia, 129 U.S. 114, 123 (1889). It thus serves to prevent governmental power from being "used for purposes of oppression." *Daniels*, 474 U.S. at 331-332 (1986) quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856).

As this Court remarked in *Moore*, the broad, elastic concept of substantive due process has proven "a treacherous field" when the judicial branch gives enhanced protection to certain substantive liberties without guidance from the more specific provisions of the Bill of Rights. 431 U.S. at 502. As general matter, therefore, this Court has been reluctant to expand the concept of substantive due process "because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. at 125. In practice, substantive due process claims accordingly seem to be reserved for those substantial claims which are "otherwise homeless." *Albright v. Oliver*, 510 U.S. 266, 288 (1994)(Souter, J., concurring) citing *Graham v. Connor*, 490 U.S. 386(1989); *Whitley v. Albers*, 475 U.S. 312(1986); and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court rejected use of the Fourteenth Amendment's substantive due process analysis and instead applied the Fourth Amendment's reasonableness standard to a claim that law enforcement officers used excessive force in the course of an investigatory stop. *Id.* The Court reasoned that because there was an "explicit textual source of constitutional protection" for the claimed misconduct, the Fourth Amendment and not any generalized notion of substantive due process would be the guide for analyzing such a claim. *Id.* Since then, this Court has noted the *Graham's* holding applies only if a constitutional claim is covered by a specific constitutional provision. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

However, if no specific textual support can be identified in the Constitution for the substantive due process violation alleged, then the claim is to be analyzed using

substantive due process standards. In ruling that a high speed police chase was neither a seizure nor a search and therefore was not "covered by" the Fourth Amendment, the Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 843-849 (1998) properly analyzed the claim for damages for the resulting death under substantive due process standards. *Id.* In concluding that the police pursuit did not cross the threshold of a due process violation, it stated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level" and therefore be actionable. *Id.* at 849. See also *Daniels*, 474 U.S. at 331 ("Historically, this guarantee...has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property")(emphasis in original).

When Section 1983 plaintiffs allege deprivations of their federal substantive due process rights in the wake of adverse land use regulations concerning their property by state or local zoning bodies, the government defendants have resorted to the defense that under *Graham* the claim must be viewed as a "taking" under the Fifth Amendment because it provides the only specific textual support in the Constitution for such a property-based claim. In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-200 (1985), for example, this Court held that a landowner's claims of a taking together with substantive due process violations stemming from the zoning authority's regulation of his land were both unripe for federal adjudication until an inverse condemnation proceeding was concluded in state court. *Id.* at 196-200. Moreover, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-1019 (1992), the Court demonstrated a willingness to analyze claims based upon allegedly burdensome or unfair land use regulations under the Takings Clause. *Id.* However, even in zoning dispute cases, the principle of substantive due process guarantees property owners the right to be free from arbitrary or irrational zoning actions. *Arlington Heights v. Metropolitan Housing Dev.*

Corp., 429 U.S. 252, 267 (1977).

With the law in this posture, the federal circuit courts of appeals are in remarkable conflict over the issue of whether a person alleging unfair or oppressive coercion by a land use authority in enforcing or implementing use restrictions upon vested property rights states a valid claim for the violation of its substantive due process rights under Section 1983, or whether such claim is subsumed by the Takings Clause of the Fifth Amendment

The First Circuit Court of Appeals has used *Graham* when considering a substantive due process claim challenging a zoning ordinance on its face as invoking only the Takings Clause protections. *South County Sand & Gravel v. Town of South Kingston*, 160 F.3d 834, 835 (1st Cir. 1998). But in that same case, it noted that if it were alleged that the town had singled the plaintiff out for special treatment or that the ordinance was specifically designed to debilitate the plain-tiff's business, a remedy would be provided for the deliberate abuse of government power, i.e., a violation of the plaintiff's right to substantive due process. *Id.* at 839 n. 5. Similarly, in *Village Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378-379 (2nd Cir. 1995), the Second Circuit analyzed separately the plaintiff's substantive due process and taking claims without mentioning *Graham* in the process of invalidating an arbitrary conditioning of a zoning permit upon conveyance of property to the town. And in *Brady v. Colchester*, 863 F.2d 205, 215-216 (2nd Cir. 1988), it held that a substantive due process violation had been made out where the permitting power had no authority under state law to revoke the plaintiff's building permit; to demand that he apply for zoning permits; and to subject him to an unnecessary approval process. *Id.*

The Third Circuit in *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285, 1292-1294 (1993), *cert. denied*, 510 U.S. 914 (1993), likewise analyzed the plaintiff's claim of an arbitrary and capricious denial of a use permit without invoking *Graham* or any of the protection afforded by the

Takings Clause. See also *Sameric Corp., Inc. v. City of Philadelphia*, 143 F.3d 582, 590-595 (3rd Cir. 1998). Moreover, the Fifth and Sixth Circuit Courts of Appeals have addressed substantive due process and taking claims stemming from land use regulations separately without citing *Graham*. See *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996); *Berger v. City of Mayfield Heights*, 154 F.3d 621 (6th Cir. 1998).

Finally, in *Tri County Industries v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) the Court of Appeals for the District of Columbia Circuit, while noting *Graham*, held that "in this circuit at least, under *Silverman* [*v. Barry*, 845 F.2d 1072, 1080 (D.C.Cir. 1988)], the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from governmental imposition." *Id.* citing *Albright*, 510 U.S. at 286-287 (Souter, J., concurring).

Pitched against these circuits most notably is the Ninth Circuit Court of Appeals. As typified by the case presently before the Court, the Ninth Circuit has consistently followed a strict reading of *Graham* and held that the Takings Clause is the sole source of protection for land use rights; and there is no basis for the recognition of substantive due process protection when challenging land use regulations of whatever kind in view of this explicit textual reference in the Constitution. *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999) citing *Macri v. King County*, 126 F.3d 1125, 1128-1130 (9th Cir. 1997) and *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996)(*en banc*). The Seventh Circuit likewise has held that any challenges to government misconduct in land use regulation may only be brought under the Takings Clause or the Equal Protection Clause, **not** with a claim for the denial of substantive due process. *Gosnell v. City of Troy*, 59 F.3d 654, 657-658 (7th Cir. 1995).

In *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996), the Tenth Circuit also relied upon *Graham* to hold that a plaintiff's substantive due process and equal protection claims were subsumed into the Takings Clause. *Id.* Finally, the Eleventh Circuit Court of Appeals has held that a plaintiff's challenge to an alleged zoning change presents only a claim under the Takings Clause and not a viable claim of a substantive due process violation. *Bickerstaff Clay Products v. Harris County, Georgia*, 89 F.3d 1481, 1489-1490 (11th Cir. 1996).

Mining and Construction therefore submit that this conflict in the federal courts is an important one which deserves to be acknowledged and addressed by this Court. Without guidance from the Court, the federal courts are likely to continue to follow different paths about the viability of substantive due process in the context of land use regulation and thereby provide different constitutional rights to the citizens of the several states for no good reason. In addition, they submit that the decision of the court of appeals below is out of step with prevailing authority, that the better and more fair approach, more consistent with the thrust of this Court's decisions, is that of the majority of the circuit courts of appeals, i.e., that a plaintiff's claim of a substantive due process deprivation stemming from an alleged coercive, unfair and oppressive decision by a land use authority upon vested property rights is not inevitably one subsumed within the Takings Clause but instead states a separate, viable cause of action under the substantive due process protection of the Constitution.

II. Sound Social Policy Reasons Warrant This Court Recognizing That Substantive Due Process Protects Landowners From Land Use Regulation By Government When It Is Carried Out Unfairly, Oppressively or Coercively.

In order to resolve the issues raised by this petition, the first step is to identify the specific constitutional right allegedly infringed. *Lewis,* 523 U.S. at 841 n. 5. *Albright*, 510 U.S. at 271. *Graham*, 490 U.S. at 394. In doing so, this Court will construe the plaintiff's complaint in the light most favorable to Stevens Creek, taking the allegations as true for the purposes of the County's motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Albright,* 510 U.S. at 268. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

With these standards in mind, the record is clear that the core of Stevens Creek's substantive due process claim is its allegation that the County, responding to some neighbors' requests to curtail mining operations on the Back Parcel, coerced Stevens Creek with the threat of imposing more onerous conditions for the Front Parcel (over which it had zoning control) so that it would surrender or renounce its vested "grandfathered" rights to mine the Back Parcel free of the County's regulatory control. It is this alleged abusive exercise of its regulatory power over one parcel by the County to coerce the surrender of Stevens Creek's vested rights in another parcel over which it has no rightful regulatory control which lies at the heart of its substantive due process claim under the Fourteenth Amendment. No claim was made below for the taking of its property under the Fifth Amendment to the federal constitution.

In essence, it is alleged that the County's abusive, unfair and coercive conduct toward Stevens Creek, using the leverage it possessed as a zoning authority on the Front Parcel to obtain concessions from Stevens Creek for its mining operations on the Back Parcel, over which it had no

regulatory control, unfairly put the petitioner "between the rock and the whirlpool", *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967), and thereby violated the mining operation's substantive due process right to be free from oppressive governmental action.

The Ninth Circuit's cryptic and dismissive description of this claim as merely "akin to a taking claim"(Pet. App. at 3) could only have been made because of the doctrinal void surrounding substantive due process in the land use context which now exists. It is a void which threatens longstanding, vested property rights of the mining industry and with it the survival of the mining industry itself. A revision of the way this Court addresses a claim of substantive due process in the context of land use regulation is now in order, if only extinguish this doctrinal void which leaves federal courts free rein to make policy judgments about the worth of such claims at the pleading stage.

Other decisions of this Court should point the way to a recognition that a substantive due process violation has been fairly made out when unfair, vindictive, illegitimate or oppressive conduct by a land use authority is alleged, regardless of a possible remedy under the Takings Clause. See *Village of Willowbrook v. Olech*, ___ U.S.___, 120 S. Ct. 1073, 1075 (2000)(Breyer, J., concurring); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993)
(applicability of one constitutional amendment right does not pre-empt the guarantees of another); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's demands.").

Mining operators cannot be blamed for unplanned population growth or for the inconvenience that urban sprawl inevitably brings. When the aggregate mining business operated under its vested property rights in a rural environment close to its source material, it was seen as serving the public interest, providing the foundation for a

growing economy and infrastructure and helping the population centers thrive. Yet as the population centers increasingly collide with ongoing mining operations, the vested property rights of mining operators have now been attack-ed as somehow compromising the public good, the very public good they have helped create. To deny them now the right to have any meaningful input into land use decisions affecting their vested property rights by relegating them to taking claims in the face of unfair, oppressive and coercive regulations, as the court of appeals has done here, makes neither good sense nor good social policy.

The members of the mining industry represented by Mining and Construction here de-serve to know the precise dimensions of their substantive due process rights when faced with government coercion which forces them to give their longstanding vested property rights in order to accommodate a vocal citizenry opposed to their operations. They should know whether the substantive due process clause protecting each citizen from abusive government conduct has viability in the land use context and whether regulatory bodies seeking to curtail or extinguish their mining operations are subject to damages and injunctive relief for the violation of their federal civil rights if they carry out that mission in an unfair, oppressive or coercive manner.

Successive mine closures, the curtailment of mining operations and ultimately the extinguishment of the mining industry itself will ensue unless this Court reestablishes the right of the mining operator to seek relief in federal court for the deprivation of its substantive due process rights whenever a government regulatory body seeks through intimidation, fear, coercion or threats to regulate the mining operator's exercise of vested property rights over which the government has no power to regulate in the first place.

This Court as a matter of sound social policy should therefore restate and redefine the contours of the protection afforded property owners by substantive due process in the land use context in order to cure the present doctrinal void

which threatens to extinguish valuable vested property rights of the mining industry and along with those rights the mining industry itself. Aggregate mining must be allowed to continue in order to support the demonstrated needs of an increased population, the need for residential and industrial building and the need for infrastructure development and repair.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate the judgment and remand the cause to the District Court for further proceedings; or provide the petitioner such other relief as is fair and just in the circumstances.

Respectfully submitted,
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